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MULTIPLICITY

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other government agency.

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April 1991

Published: 134 Mil. L. Rev. 45 (1991)

MULTIPLICITY

by Captain Thomas L. Herrington

ABSTRACT: This thesis examines the federal counterpart of military multiplicity practice, its constitutional bases, historic development, and rules of application. This thesis also examines military multiplicity practice and its basis in law. This thesis concluded that military multiplicity fails the constitutional requirements of the separation of powers doctrine and the Double Jeopardy Clause.

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I. INTRODUCTION.

In federal practice, the double jeopardy protection against multiple punishment for the same offense has been described as "one of the least understood" and "most frequently litigated" issues.[1] In military practice, the protection operates under the nom-de-guerre "multiplicity." Even so, multiplicity has assumed an identity unique and independent from federal practice. Although federal multiplicity practice has had its detractors, military multiplicity practice has been described as a "mess" and a "minefield."[2] The United States Court of Military Appeals has itself admitted that its concept of multiplicity is "confusing."[3] The court's kinder critics have deemed military multiplicity practice "problematic."[4] Others have not been gentle with their criticism.[5] An overview of the decisions and analyses by the Court of Military Appeals calls to mind an observation Chief Judge Cuthbert W. Pound made of the New York Court of Appeals:

> No two cases are exactly alike. A young attorney found two opinions in the New York Reports where the facts seemed identical although the law was in conflict, but an older and more experienced attorney pointed out to him that the names of the parties were different.[6]

II. "MULTIPLICITY" IN FEDERAL PRACTICE.

The United States Court of Military Appeals has identified three forms of objectionable multiplicity: multiplicity in charging, multiplicity in findings and multiplicity in sentencing.[7] In federal practice, the word "multiplicity" when used as a term of art[8] refers to the practice of charging the same offense in more than one count.[9] Although the military concepts of multiplicity for findings and multiplicity for sentencing do not exist as such in federal practice, federal courts apply parallel but nevertheless distinct principles. In order to understand the federal multiplicity rules,[10] one must first understand the underlying constitutional

principles and the system of criminal justice American legislatures have developed from these principles.

A. The Constitutional and Legislative Bases for Federal Multiplicity

Two principles of constitutional law define the federal rules of multiplicity. The first is the constitutional doctrine of separation of powers. The second is the Double Jeopardy Clause of the Fifth Amendment.[11]

1. The Doctrine of Separation of Powers.

The framers of the United States Constitution vested executive, legislative and judicial powers in three, coordinate branches of government.[12] Although the Constitution does not hermetically seal judicial, executive and legislative powers within each respective branch of this tripartite system,[13] the Supreme Court is

nevertheless vigilant in guarding against any encroachment of power which might endanger "the integrity and maintenance of the system of government ordained by the Constitution."[14] With respect to the power to enact law, the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[15]

For purposes of federal multiplicity, one concept defines the interrelationship of the legislative, executive and judicial branches: "the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, <u>resides wholly with the Congress</u>."[16] The powers of the executive and judicial branches may be stated as corollaries of this principle.

The executive power to prosecute derives solely from legislative enactments because "[i]t is the Congress, and not the prosecution, which establishes and defines offenses."[17] The executive branch nevertheless

exercises its Congressionally-created authority to prosecute free from judicial supervision. This notion is premised on the principle that "[t]he Government, and not the courts, is responsible for initiating a criminal prosecution, and, subject to applicable constitutional limitations it is entitled to choose those offenses for which it wishes to indict and the evidence upon which it wishes to base the prosecution."[18]

The judiciary's role in adjudging and reviewing the constitutional permissibility of punishments is limited to ascertaining the punishments authorized by Congress because "once the legislature has acted courts may not impose more than one punishment for the same offense."[19] In this respect, the Double Jeopardy Clause has been described as an "embodiment" of the doctrine of separation of powers.[20]

2. The Double Jeopardy Clause.

The Double Jeopardy Clause is "cast explicitly in terms of" protecting against successive trials for the same offense.[21] Nevertheless, the Supreme Court interprets the Double Jeopardy Clause as a prohibition against multiple punishments for the same offense at a single trial.[22] In this respect, the Clause "does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[23] Several constitutional provisions restrict the power of legislatures to create and define offenses,[24] but "[f]ew if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses."[25] As the Supreme Court has described the legislative power to create and define offenses, "[t]here is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction."[26] Accordingly, "[t]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where

Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution."[27] In effect, the double jeopardy protection from multiple punishments is coextensive with legislative limitations on the courts and prosecutors under the separation of powers doctrine. This redundancy is illustrated by two early decisions.

In the 1873 decision Ex parte Lange,[28] the Court first suggested that the Double Jeopardy Clause includes an implicit prohibition against multiple punishment for the same offense. Lange was convicted of a single violation of a single statutory offense. The trial court sentenced Lange to a term of confinement and a fine; the statute authorized punishment in terms of confinement or a fine. The Lange Court first discussed a "maxim of the common law":

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one

> statutory offence, . . . there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.[29]

The Court stated that this principle of common law was "very clearly" embodied within the "spirit" of the Constitution.[30] The Court concluded, "The argument seems to us irresistable, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."[31]

Fourteen years later, the Court decided In re Snow.[32] Although the case differed from Lange factually, those facts raised an issue within the scope of the Court's previous pronouncement on the Double Jeopardy Clause. The Court, however, referenced neither Lange nor the Double Jeopardy Clause. The Court considered the matter solely as a question of whether Congress had authorized separate punishments. In other words, the case turned on the principle of separation of powers.

Snow received three separate convictions for unlawful cohabitation with the same woman: one alleged unlawful cohabitation from January 1, 1883, through December 31, 1883; another alleged unlawful cohabitation from January 1, 1884, through December 31, 1884; the last alleged unlawful cohabitation from January 1, 1885, though December 31, 1885.[33] In holding that Snow had committed but a single, continuous violation of the statute, the Court relied on the English case Crepps v. Durden[34] and quoted at length from the opinion authored by Lord Mansfield:

> Here are three convictions of a baker, for exercising his trade on one and the same day, he having been before convicted for exercising his ordinary calling on that identical day. If the act of Parliament gives authority to levy but one penalty there is an end of the question; for there is no penalty at common law. On the construction of the act of Parliament the offence is "exercising his ordinary trade on the Lord's day"; and that without any fraction of a day, hours or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consists of one, or of a number of particular acts.[35]

Relying on this precedent, the Court granted Snow's petition for writ of habeas corpus. The Court concluded: "The principle which governs the present case has been recognized and approved in many cases in the United States."[36] Thus, Snow was resolved on the basis of the doctrine of separation of powers despite the fact that it dealt with a second punishment "proposed in the same court, on the same facts, for the same statutory offense" just as Lange did.[37] While Snow and Lange could have been resolved on the same constitutional basis, the Court nevertheless resolved the cases on distinct grounds and achieved the same result.[38] The point is that legislative intent alone established the maximum permissible punishment regardless whether the matter was viewed as an issue of double jeopardy or of the doctrine of separation of powers.

3. The American System of Criminal Justice.

In exercising their plenary, constitutional power to create and define offenses, American legislatures have

steadily enlarged the number of overlapping, predicate and ancillary criminal offenses.[39] In doing so, legislatures contemplate the permissive application of the full panoply of criminal sanctions to any one criminal act, transaction or enterprise. One may criticize multiple convictions and pyramiding penalties for the same criminal act as redundant and unnecessary, but this scheme of criminal justice reflects two practical concerns. First, it acknowledges the inability of a legislature to anticipate every variation of human behavior which might comprise or attend a criminal act or enterprise. Second, it promotes the notion that criminal penalties should be individualized to reflect the defendant's misconduct.

It is axiomatic that criminals do not act with the niceties of statutory prohibitions in mind--after all, the essence of crime <u>is</u> violation of the law. To achieve the criminal purpose, criminal ingenuity seizes upon every device, scheme, and specie of act which will aid in the success of the criminal enterprise. Thus, although the independent criminal enterprises of two

individuals may ultimately violate the same statute, one's ancillary and predicate acts might reflect a substantially greater or significantly different criminal culpability.[40] In other circumstances, the consequences of an essentially identical criminal act may be significantly distinct.[41] No legislative body could possibly anticipate every variation of human behavior and every aggregation of acts that might conceivably make up a criminal enterprise or undertaking.

To individualize any one criminal enterprise for purposes of prosecution and punishment, American legislatures have created an array of distinct statutory offenses many of which overlap. A legislature individualizes the criminal enterprise by authorizing discrete convictions for a criminal transaction under multiple, independent statutory offenses. Each conviction represents a legislatively distinguished act of criminal misconduct and the penalties pyramid accordingly.

B. "All Guides to Legislative Intent"[42]: The Federal Rule of Multiplicity

As stated above, the double jeopardy prohibition against multiple punishment for the same offense prohibits the imposition of punishment in excess of that authorized by the legislature. Thus, legislative intent alone delimits the maximum permissible punishment under the constitutional doctrine of separation of powers. In federal practice, the permissibility of multiple convictions and the permissibility of multiple charges are derivative issues. Consequently, a multiplicity analysis in federal practice begins with the determination of whether the legislature has authorized multiple punishments.

1. Multiplicity for Sentencing Purposes.

Regardless of the context in which a multiplicity issue arises, a "clear indication of legislative intent" will control.[43] Although a rule of statutory

construction might mandate a different result, the Supreme Court applies a rule of construction "only . . . when the will of Congress is not clear."[44] Thus, where a legislature specifically authorizes multiple punishments under two statutes, "regardless of whether those two statutes proscribe the 'same' conduct under [a rule of statutory construction], a court's task is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."[45] Legislative intent may be found in the language, structure, or legislative history of the statutes in issue.[46]

When a court finds no manifestation of legislative intent in these sources, it must resort to rules of statutory construction. The Court described the difficult task of determining legislative intent in United States v. Universal C.I.T. Credit Corp.:

> Generalities about statutory construction help us little. They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique. For that reason

> we may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and clause and the statute that express the purpose of Congress. Very early Mr. Chief Justice Marshall told us, "Where the mind labours to discover the design of the legislature, it seizes upon every thing from which aid can be derived . . . ."[47]

The issue of legislative intent for double jeopardy purposes generally arises in two contexts[48] involving opposite presumptions of legislative intent. First, it arises where multiple counts charge the same act or transaction under separate statutes. Second, it arises where multiple counts charge the same act or transaction under the same statute.

a. The Rule of Construction for Counts Charged Under the Same Statute.

When a single transaction is charged in multiple counts as a violation of a single statute, there is a presumption that Congress intended but a single punishment. As the Court stated in Gore:

> We [have] held that the transportation of more than one woman as a single transaction is to be dealt with as a single offense, for the reason that when Congress has not explicitly stated what the unit of offense is, the doubt will be judicially resolved in favor of lenity . . . for a single transaction to include several units relating to proscribed conduct under a single provision of a statute.[49]

The Court explained this rule of construction in Bell v. United States:

> It is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it--when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.[50]

When multiple counts charge the same criminal transaction as ostensibly "separate" violations of the same statute, the court faces several possible legislative intents. First, the court faces the possibility that Congress did not intend to have a single

act, transaction or episode fragmented into more than one offense under the same statute.[51] There is the possibility that Congress intended to create a continuing offense.[52] It is also possible that Congress defined a predicate act with the intent that punishment would merge with that authorized for another act proscribed by the same statute.[53] Finally, there is the possibility that Congress intended to create but a single offense but defined it in such a way that a conviction could be obtained on different factual theories of guilt.[54]

The unit-of-prosecution rule of construction assumes that the legislature intended any one statutory enactment to define an offense that "compendiously treats as one offense all violations that arise from that singleness of thought, purpose, or action, which may be deemed a single 'impulse.'"[55] The rule creates a presumption that, had Congress intented multiple convictions and punishment for the same act under the same statute, Congress would have expressly defined the unit of prosecution in those terms. Paraphrasing Bell and Lange, this presumption affords entire and complete protection under the Double Jeopardy

Clause from multiple punishment whenever a second punishment is proposed for a factually united violation of a single statute.

One case is frequently cited to illustrate the statutory language necessary to rebut the presumption that a single statute creates a single unit of prosecution. In Ebeling v. Morgan, the defendant was convicted of six counts of "feloniously tear[ing], cut[ting], and injur[ing]" six mailbags.[56] Ebeling broke into a "certain railway postal car, then and there in transit on certain railroad," and rifled six mailbags.[57] The Court held:

> Reading the statute with a view to ascertaining its meaning, it is apparent that it undertakes to make an offender of anyone who shall cut, tear, or otherwise injure any mailbag . . . . These words plainly indicate that it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut or injured, the offense is complete. Although the transaction of cutting the mail bags [in this case] was in a sense continuous, the complete statutory offense was committed every time a mail bag was cut in the manner described, with the intent charged . . . irrespective of any attack upon,

> or mutilation of, any other bag. The words are so plain as to require little discussion or further amplification.[58]

b. The Rule of Construction for Counts Charged Under Separate Statutes.

Where the counts in issue charge separate statutory violations,[59] the Court applies the Blockburger test

> . . . and does so with no small degree of confidence.[60]

As the Court explained in Albernaz v. United States:

> Congress cannot be expected to specifically address each issue of statutory construction which may arise. But as we have previously noted, Congress is "predominantly a lawyer's body," and it is appropriate for us to "assume that our elected representatives . . . know the law." As a result, if anything is to be assumed from the congressional silence on this point, it is that Congress [is] aware of the Blockburger rule and legislate[s] with it in mind. It is not a function of this Court to presume that "Congress was unaware of what it accomplished . . . ."[61]

In effect, the Blockburger test establishes a presumption of legislative intent: if each of two statutes requires proof of an element distinct from the other, it

is presumed that Congress intended to authorize separate punishments.[62]

The Blockburger test may be expressed with the simplicity and precision of mathematical terms. If all of the statutory elements of the offense charged in one count of an indictment are a subset of all of the statutory elements of an offense charged in another count, the two counts charge the "same offense."[63] The test is entirely abstract; double jeopardy will not bar multiple, cumulative punishment so long as the charges are "distinct in point of law . . . however nearly they may be connected in fact."[64] If each statutory offense is not defined in terms of at least one distinct element, the offenses are deemed "coterminous, in effect one offense with two labels."[65]

Although successive prosecutions were prohibited at common law, the term "same offense" had not been defined at the time the Bill of Rights was adopted.[66] According to Justice Brennan, "the common law . . . did finally attempt a definition in The King v. Vendercomb, 2

Leach 708, 720, 168 Eng. Rep. 455, 461 (Crown 1796)," and created what is now called the Blockburger test.[67] The Supreme Court adopted the Blockburger elements test in 1911,[68] rejected a challenge to the test in 1958,[69] and has not looked back since.

Regretably, the Blockburger test has often been expressed in terms of "same evidence,"[70] "lesser included offenses,"[71] and "proof of facts."[72] Superficially, these descriptions of the test are not inaccurate. They are, however, somewhat misleading. With respect to the "same evidence" statement of the test, the Court has pointed out: "Commentators and judges alike have referred to the Blockburger test as the 'same evidence' test. This is a misnomer. The Blockburger test has nothing to do with the evidence presented at trial. It is concerned solely with the statutory elements of the offenses charged."[73]

When the test is stated in terms of "lesser included offenses," it means lesser included as a matter of law.[74] Thus, counts charging violations of separate

statutes are lesser included only when one statute by definition "incorporates" all of the elements of the other statute.[75] With respect to "proof of facts," one need only note that the full text of Blockburger states the test as "whether each provision requires proof of a fact which the other does not."[76] In Harris v. United States, the Supreme Court rejected a double jeopardy challenged premised on grounds that the government established violations of two separate statutes by proof of the same operative fact.[77]

An erroneous determination of permissible punishments will result more frequently than not if a court applies a test based solely on the terms "same evidence," "proof of facts" and "lesser included offenses" taken out of context. These terms inaccurately suggest that a court resolve the issue on the basis of the evidentiary relationship between the acts of misconduct alleged in the charges rather than the legislatively defined elements of the statutes in issue. In effect, it suggests a resolution based on due process notions of lesser incuded offenses.

For purposes of due process, an offense not charged may be lesser included in a charged offense because of surplusage in the factual allegations set forth in another, charged offense or because of evidence raised at trial.[78] Our present-day due process notions of lesser included offenses developed from a common law doctrine which was designed to assist the prosecution.[79] When the evidence at trial failed to establish the offense charged, the prosecution could yet obtain a conviction for some less serious, "closely related" offense if the pleadings satisfied the due process requirement for notice to the defendant.[80] Later, the Court held that due process notions of a fundamentally fair trial requires a lesser included offense instruction when warranted by the evidence.[81]

If a "lesser included offense" test for multiplicity encompassed such due process notions of a lesser included offense, application of that test would often result in an erroneous result. Statutory offenses which are "closely related" under the common law doctrine

or the Due Process Clause might not present the identity of elements required under the Blockburger test. More to the point, neither the evidence introduced in any one trial nor mere surplus allegations of fact set forth in an indictment reflect legislative intent. Stated otherwise, offenses which might be lesser included under the Due Process Clause might not be lesser included under the Double Jeopardy Clause.

Two cases illustrate a proper application of the Blockburger test and demonstrate that due process notions of lesser included offenses do not determine the permissiblity of multiple punishment. In Albrecht v. United States, the defendant was convicted of four counts of illegal possession of liquor and four counts of illegal sale of the same liquor. As the Court analyzed the case:

> [P]ossessing and selling are distinct offenses. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he never has possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does

not render the possession and the sale a single offense.[82]

In United States v. Woodward, the accused and his wife passed through United States Customs carrying $12,000 and $10,000, respectively. As he processed through Customs, Woodward checked "no" on a Customs form that asked whether he or any member of his family was carrying over $5,000 into the country. As the Court evaluated the case:

> Woodward was indicted on charges of making a false statement to an agency of the United States, 18 U.S.C. § 1001, and willfully failing to report that he was carrying in excess of $5,000 into the United States, ... The same conduct--answering "no" to the question whether he was carrying more than $5,000 into the country--formed the basis of each count.
>
> . . .
>
> [P]roof of currency reporting violation does not necessarily include proof of a false statement offense. Section 1001 proscribes the nondisclosure of a material fact only if the fact is "conceal[ed] . . . by any trick, scheme, or device." (Emphasis added). A person could, without employing a "trick, scheme, or device," simply and willfully fail to file a currency disclosure report. A traveler who enters the country and passes through Customs prepared to answer questions truthfully, but is never asked whether he is

> carrying over $5,000 in currency, might nonetheless be subject to conviction under 31 U.S.C. § 1058 (1976 ed.) for willfully transporting money without filing the required currency report. However, because he did not conceal a material fact by means of a "trick, scheme, or device," (and did not make any false statement) his conduct would not fall within 18 U.S.C. § 1001.[83]

In Albrecht, possession of the liquor under the facts of the case was a lesser included offense of sale under the facts of the case. Under the allegations of fact in the indictment in Woodward, the charge alleging the willful failure to report the currency was lesser included in the charge for the false report. Correctly applying the Blockburger test in both Woodward and Albrecht, the Court yet approved cumulative punishments under the separate statutes. These cases illustrate that a mere factual or procedural relationship between counts do not obviate the separate nature of the offenses even if one of those counts might otherwise constitute a lesser included offense as a matter of due process. As the Court concluded in Woodward, "We cannot

assume . . . that Congress was unaware that it had created two different offenses permitting multiple punishment for the same conduct."[84]

c. The Doctrine of Lenity

In those cases where the Court is unable to determine legislative intent, the Court applies a rule of lenity: "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."[85] In effect, the Court will not attribute to Congress "an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history."[86] The Supreme Court has defined the analytical role of this rule as follows:

> The rule of lenity only serves as an aid for resolving an ambiguity in a statute: it is not to be used to beget one, and the rule comes

> into operation at the end of the process of construing what Congress has expressed, and not at the beginning as an overriding consideration of being lenient to wrongdoers, as that is not the function of the judiciary.[87]

Thus, the judicial doctrine of lenity implicitly acknowledges the power of the legislative branch to create, define, and pyramid punishment, but declines to find such an intent when the rules of statutory construction do not warrant such a finding.

d. The Analysis.

When the same transaction is charged in more than one count of a single indictment, the defendant may challenge the imposition of separate punishments. Because Congress has plenary, constitutional power to create and define offenses and because the Double Jeopardy Clause prohibits a court from imposing multiple punishments for what Congress has defined as the "same offense," the question is whether those counts proscribe the "same offense."

If the counts charge violations of the same statute, there is a presumption that those counts charge a violation of the same offense. To obtain cumulative punishment for each count, the government must rebut that presumption by demonstrating a legislative intent to authorize separate punishments for that offense. If the court fails to find clear legislative intent either to define two discrete offenses in the same statute or to define the offense in terms of discrete units of prosecution, the doctrine of lenity permits the court to impose only one punishment.

If the counts charge violations of separate statutes, the court must identify the elements of the offenses Congress has created in those statutes. If there is an identity of elements between those two statutes, there is a presumption that the statutes define the same offense. If one of the statutes includes all of the elements of the other statute, those statutes proscribe the same offense because the two statutes merge as lesser included one of the other. Again, the

government bears the burden of rebutting the presumption by demonstrating a clear legislative intent to punish the defendant under both statutes. Otherwise, the doctrine of lenity will preclude imposition of separate punishments.

If each statute requires proof of an element not required by the other, there is a presumption that Congress has created two offenses with the intent to authorize separate, cumulative for both. In this situtation, the burden is on the defendant to rebut the presumption by showing a clear legislative intent to punish the transaction under only one of the statutes. If the defendant fails to rebut the presumption, the doctrine of lenity must give way to the presumption.

2. Multiplicity for Findings

While the double jeopardy prohibition against multiple punishment clearly addressed the sentencing aspect of "same offenses," the question remained whether

findings of guilty were permissible when the offenses were not separate for purposes of punishment. Prior to 1985, federal courts dealt with separate convictions for the "same" offense in different ways.[88] Some courts vacated both the sentence and conviction.[89] Others, employing what was called the doctrine of concurrent sentencing, simply held that an issue of multiple convictions did not arise whenever the court ordered a concurrent sentence on the multiplicious count.[90]

In Ball v. United States, the Court reconciled the split among the circuits by ruling that a multiplicious conviction for the same offense itself carries an element of punishment; it is therefore impermissible under the Double Jeopardy Clause.[91] Thus, the issue of multiplicity for findings is no different than the issue of multiplicity for sentencing.

3. Multiplicity in Charging.

As indicated above, the term "multiplicity," when used as a term of art in federal practice, refers to the practice of charging the same offense in more than one count.[92] In this sense, it is the antithesis of "duplicity," the practice of pleading more than one offense in a single count. The multiplicity doctrine is a rule of pleading which is based on the double jeopardy prohibition against multiple punishments. When an indictment alleges the same offense in more than one count, "the indictment exposes the defendant to the threat of receiving multiple punishment for the same offense."[93] Nevertheless, the mere fact that two counts charge the same offense under the Blockburger rule will not necessarily entitle the defendant to relief.

In United States v. Batchelder, the Court stated that "when an act violates more than one criminal statute [that defines the "same offense"], the Government may prosecute under either so long as it does not discriminate against any class of defendants."[94] Many courts read this sentence out of context and concluded that Batchelder required the prosecutor to elect which

multiplicious charge he would prosecute.[95] In Ball, the Court made it clear that it "had no intention of restricting the Government to prosecuting for only a single offense."[96] The Court declared, "[The Double Jeopardy Clause] does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution."[97]

Quite the contrary, the law permits charging "lesser included" offenses because due process would entitle a defendant to an instruction on the lesser included offense in any event.[98] A motion for appropriate relief challenging charges on the basis of multiplicity should be granted only in those cases where the prosecution has impermissibly fragmented one offense into several or charged a continuing type of offense in more than one count.[99]

C. "All Guides to Legislative Intent"[100]: A Rational

A number of justices on the Supreme Court have taken issue with the proposition that the Double Jeopady Clause imposes no limitation on the legislative power to create and define offenses. In their view, the double jeopardy proscription against multiple punishments for the same offense restricts legislative power to authorize multiple convictions and punishment for any one criminal transaction. In effect, they view the separation of powers doctrine as subordinate to the Double Jeopardy Clause.

In United States v. Gore,[101] Justice Douglas first articulated the "one transaction, one conviction, one punishment" notion of double jeopardy. Gore was prosecuted for two sales of narcotics. Each sale was "broken down into three separate and distinct crimes" and consecutive sentences were imposed for each of six findings of guilty.[102] In Justice Douglas' view

> Plainly Congress defined three distinct crimes, giving the prosecutor on [the facts of the case] a choice. But I do not think the courts were warranted in punishing petitioners three times for the same transaction. I realize

> that [Blockburger v. United States[103]] holds to the contrary. But I would overrule that case.
>
> I find that course necessary because of my views on double jeopardy.[104]

Justice Douglas reasoned that the defendant had been the subject of multiple prosecutions at the same trial and on the same evidence.[105] He urged a construction of the Double Jeopardy Clause to the effect that "out of the same facts a series of charges shall not be preferred."[106] The majority's response was compelling.

The majority opinion in Gore first declared that the prohibition against double jeopardy is a firmly rooted, historic protection and not an evolving concept of law; it further observed that Douglas' view would overrule precedents dating back more than fifty years.[107] Most important, the Court exposed the utter illogic of the urged interpretation:

> Suppose Congress, instead of enacting the three provision before us, had passed an enactment substantially in this form: "Anyone who sells drugs except from the original stamped package and who sells such drugs not in

> pursuance of written order of the person to whom the drug is sold, and who does so by way of facilitating the concealment and sale of drugs knowing the same to have been unlawfully imported, shall be sentenced to not less than fifteen years' imprisonment: Provided, however, That if he makes such sale in pursuance of written order of the person to whom the drug is sold he shall be sentenced to only ten years' imprisonment: Provided further That if he sells such drugs in the original stamped package he shall also be sentenced to only ten years' imprisonment: And provided further, That if he sells such drugs in pursuance of written order and from a stamped package, he shall be sentenced to only five years' imprisonment." Is it conceivable that such a statute would not be within the power of Congress? And is it rational to find such a statute constitutional but to strike down the Blockburger doctrine as violative of the double jeopardy clause [sic]?[108]

As the Court evaluated Douglas' view: "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment . . . these are peculiarly questions of legislative policy."[109]

In Missouri v. Hunter, Justice Marshall resurrected Justice Douglas' proposition that "[w]hen multiple charges are brought the defendant is 'put in jeopardy' as

to each charge."[110] Beginning with the premise that "each separate conviction typically has collateral consequences" and that "each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation,"[111] Marshall reasoned:

> The very fact that the State could simply convict a defendant . . . of one crime and impose an appropriate punishment for that crime demonstrates that it has no legitimate interest in seeking multiple convictions and multiple punishment. The creation of multiple crimes serves only to strengthen the prosecution's hand. It advances no valid state interest that could not just as easily be achieved without bringing multiple charges against the defendant.[112]

The majority's response was perfunctory: "Legislatures, not courts, prescribe the scope of punishments."[113]

Thus, in the context of a single trial, the double jeopardy phrase "same offense" takes on a meaning that acknowledges and effectuates the legislative design underlying the pyramiding scheme of punishments characteristic of our American system of criminal justice. Had the Supreme Court adopted the "one

transaction, one conviction, one punishment" view of the Double Jeopardy Clause, the prohibition against multiple punishments would frustrate this scheme of criminal justice. Such a restriction would reward the offender for having committed in serio a number of distinct offenses by limiting conviction and punishment to the ultimate, consummated goal of his criminal enterprise.

In this regard, Justice Marshall's concern with the stigma and collateral consequences of additional convictions is fallacious. Drawing from the Gore analysis, if Congress possesses the power to authorize the pyramiding of sentences under separate statutes, surely it possesses the power to pyramid the stigma and collateral consequences attending those additional convictions.[114] In this sense, the additional stigma and consequences are as much an element of permissible punishment as the additional period of confinement. Thus, Justice Marshall's preoccupation with the purportedly collateral consequences of multiple convictions does not present a matter independent of the question whether a legislature can constitutuionally

authorize multiple punishments for the same offense. Rather, it is subsidiary to the question whether Congress may pyramid punishment at all.

D. Eliminating Confusion in the Arena of Double Jeopardy: "Same Offense," Different Meanings

The double jeopardy protection serves two distinct interests. It limits the power of the courts to that authority granted by Congress (the protection against multiple punishment) and it assures the criminal defendant some measure of finality in criminal prosecutions (the protection against successive prosecutions).[115] The dual nature of the Double Jeopardy Clause has generated confusing dicta and suspect analyses in the Court's case precedents.[116] A better understanding of these distinct protections is essential if one is to fully understand and apply Supreme Court precedents.

The point to bear in mind is that these double jeopardy protections are not coextensive. The double jeopardy protection against multiple punishments is coextensive with the doctrine of separation of powers. At a single trial, this protection serves only to restrict a court's power to adjudge convictions and sentences to that authorized by the legislative branch of government. The double jeopardy protections against multiple prosecutions is not coextensive with the double jeopardy protection against successive trials. The double jeopardy protection against successive trials is a broader, more fundamental protection which operates independent of legislative authority. As the Supreme Court has explained:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.[117]

The United States Court of Appeals for the Ninth Circuit has described this safeguard interest in terms of "assuring finality, sparing defendants the financial and psychological burdens of repeated trials, preserving judicial resources, and preventing prosecutorial misuse of the indictment process."[118] In Grady v. Corbin, the Court further stated that "[m]ultiple prosecutions also give the States an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction of one or more of the offenses charged."[119] In other words, the double jeopardy protection against successive trials "serves the additional purpose of providing criminal defendants with a measure of finality and repose."[120]

A uniform definition of the term "same offense" as it appears in the Double Jeopardy Clause could not serve this dichotomy of interests without subordinating or sacrificing one or the other.[121] The rule of statutory construction--whether called the elements test, the same evidence test, or the proof of facts test--would bar a subsequent prosecution only if the statutes defined a

"same offense" both "in law and in fact."[122]

When applied in the context of successive prosecutions, the rationale underlying the traditional Blockburger test was the due process notion that a jury could have returned a verdict of guilty to an offense included in the one charged.[123] Thus, "[i]f a conviction might have been had, and was not, there was an implied acquittal."[124] In effect, an acquittal of the "greater" offense barred a subsequent prosecution for any offense lesser included as a matter of law on the theory that the jury could have returned a finding of guilty of the lesser included offense but refused to do so. Even if the pleadings were insufficient as a matter of due process to permit a finding of guilty on the lesser included offense, a subsequent prosecution would nevertheless be barred because "the greater crime would involve the lesser."[125]

This elements test no doubt well served the double jeopardy guarantee against successive trials when applied in the arena of common law offenses and early, relatively

simple criminal codes. Over the years, however, criminal codes became more comprehensive as legislatures enacted additional statutes to create overlapping, predicate and compound offenses. Under the Blockburger test, a comparison of the elements of these newly created, more comprehensive statutory offenses did not necessarily result in a finding that the offenses were lesser included. Thus, the double jeopardy guarantee against successive prosecutions could not, under the Blockburger test, afford the criminal defendant the full measure of protection intended by the Fifth Amendment. As Justice Brennan observed:

> The "same evidence" test of "same offence" . .. does not enforce but virtually annuls the constitutional guarantee.
>
> . . .
>
> Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of criminal prosecution, the potentialities for abuse inherent in the "same evidence" test are simply intolerable.[126]

The elements test was so ill-suited to the task of protecting the defendant's constitutional guarantee against successive prosecutions that the judicial doctrines of collateral estoppel[127] and res judicata[128] often afforded the defendant a more effective safeguard.[129] Because the Blockburger test was largely ineffective in protecting an accused from multiple prosecutions, many commentators advocated adoption of the so-called "same transaction" test to alleviate the potential for harsh results under Blockburger.[130]

The same transaction test rested on a proposed rule of procedure which would require the prosecution to fully exercise its power to join related offenses in a single proceeding.[131] If the prosecution failed to join all the offenses arising out of a single act or transaction in a single prosecution, a subsequent prosecution would have been barred[132] on the theory that the Government had waived its right to prosecute that offense.[133] Although commentators contemplated legislative action to

effect these rules, three justices of the Supreme Court deemed them implicit in the Double Jeopardy Clause.[134] Nevertheless, a majority of the Court has never embraced that view and the Court has recently gone to some length to emphasize that it has not adopted that test.[135]

The Court did, however, recognize that the double jeopardy protection includes a collateral estoppel feature.[136] Thus, the Court came to acknowledge that "[t]he Blockburger [elements] test is not the only standard for determining whether successive prosecutions involve the same offense."[137] Many courts, however, misconstrued this observation as a wholesale renunciation or modification of the Blockburger test even for the purpose of determining legislative intent for multiple punishments in the same trial. This misunderstanding was resolved in Grady v. Corbin.[138]

There, the Court reiterated that the role of the Double Jeopardy Clause in a single prosecution was to effect legislative intent.[139] The Court further reiterated that a court must apply the Blockburger test

to determine legislative intent in single prosecution cases.[140] The Court acknowledged, however, that, the the double jeopardy protection against successive prosecutions required an additional test even broader than its collateral estoppel feature.[141] The Court articulated this new test in the following terms:

> The Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.
>
> . . .
>
> The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. On the other hand, the State cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct.[142]

In effect, the Court has given the double jeopardy term "same offense" two separate meanings. In the context of multiple punishments at a single trial, it means "same offense according to legislative intent." In the context

of successive prosecutions, it means "same offense according to legislative intent and according to the evidence presented at a previous prosecution."

There is an innate resistance to the notion that the same term in the same phrase can have two different technical meanings.[143] Although dual constructions of the same constitutional provision seems somewhat paradoxical, the dichotomy of interests served by the Double Jeopardy Clause mandates distinctive tests. With the advent of Grady v. Corbin, one must accept the anomaly of "'same offense,' different interpretations," because one must identify the interest protected in each case[144] in order to determine the correct, applicable standard of double jeopardy.

One must also keep the duality of interests in mind when reading case precedents. The Grady Court did not fashion the rule of double jeopardy for successive prosecutions from whole cloth. That test was the product of evolving views of the protection against successive prosecutions. The Court expressed these views in the

dicta of many precedents.[145] In addition to the independent tests applied between the double jeopardy protections against successive prosecutions and multiple punishment, various factions on the Supreme Court have advocated--and continue to advocate--independent and conflicting views of both protections the Double Jeopardy Clause.

One faction insists that the Blockburger test is the sole measure of protection for all double jeopardy interests.[146] Others have argued that the Double Jeopardy Clause plays no role in determining what punishments are permissible in a single trial.[147] Still others take an opposite view, as noted above, and contend that the Double Jeopardy Clause restricts the power of Congress to authorize cumulative convictions and punishments even at a single trial.[148] All of these divergent views have found expression in the dicta of many cases.[149] Nonetheless, two clearly separate tests have been articulated and one must consider the possibility that the dicta of any one opinion may not of the majority of the Court. Unfortunately, the United

States Court of Military Appeals has not always drawn these subtle but critical distinctions.

III. Military Multiplicity.

Military multiplicity practice as defined by the United States Court of Military Appeals is unique from federal mulitplicity practice. Contrary to the constitutional dictates of the Double Jeopardy Clause and the separation of powers doctrine, military multiplicity practice rarely involves legislative intent.

A. Multiplicity for Purposes of Sentencing

In United States v. Baker, the United States Court of Military Appeals declared that the government's reliance on the Blockburger test was "incorrect" and announced, "the President did not simply adopt the so-called 'Blockburger' rule to determine whether offenses arising from the same transaction were separate

for purposes of punishment in the military."[150] In support of this declaration, the court cited paragraph 76a(5) of the 1969 Manual:

> Care must be exercised in applying the general rule [that offenses are not separate unless each requires proof of an element not required to prove the other] as there are other rules which may be applicable, with the result that in some instances a final determination of whether two offenses are separate can be made only after a study of the circumstances involved in the individual case.[151]

The court's reliance upon paragraph 76a(5) as authority for its ruling was misplaced. The language the court relied upon was included in the 1969 Manual in recognition of the court's own precedents that disregarded wholesale the sentencing provision of the 1951 Manual.

The 1951 Manual prescribed the following test to determine whether offenses were "separate": "The offenses are separate if each offense requires proof of an element not required to prove the other."[152] The drafter stated his intent in prescribing the foregoing test as follows:

> Although he may be found guilty of all offenses arising out of one transaction, the accused may be punished only for separate offenses. These two rules are taken, generally, from the decisions of the Federal courts. The rule that offenses are separate if each offense requires proof of an element not required to prove the other is commonly referred to as the "Blockburger rule," having been taken from the opinion of the Supreme Court in Blockburger v. United States (1932), 284 U.S. 299.[153]

The drafters--and, presumably, the President--intended to adopt the then-existing federal multiplicity practice for application to military courts-martial.

The Court of Military Appeals, however, had misinterpreted the Blockburger test and applied it incorrectly since the 1950's. The court did not focus on the statutory elements of the "offense" to determine legislative intent as required by Blockburger. Rather, the court focused on the allegations of fact in the specifications to define the accused's offenses.[154] Thus, the Court of Military Appeals must be numbered among those unfortunate "commentators and judges alike"[155] who erroneously focused on the factual

allegations contained in the specifications to identify the "elements" of an accused's "offense." In effect, the prosecutor's skill in drafting specifications determined whether the court could impose separate punishments. Problems were inevitable under the interpretation of the test adopted by the Court of Miltary Appeals. Prosecutors could effectively circumvent the double jeopardy protections against multiple punishment for the same offense by artfully drafting specifications.

By 1953, the court had begun to express dissatisfaction with the test.[156] The court had discovered, not surprisingly, that a critical analysis of the facts underlying some specifictions "reveal[ed] the differences [in the offenses charged] to be illusory."[157] The court noticed that the factual allegations which constituted distinct elements often "merely create[d] a separate arm of the very same crime" even though a "superficial application of [the court's version of] the Blockburger test [made] it appear that two offenses [were] described."[158] As the court later evaluated the situation, "Certain difficult fact

situations which appear [sic] to smack of unfairness in doubling the punishment for what might be regarded as one omission have required this Court to seek a judicial means of answering perplexing questions."[159]

In lieu of the court's version of the Blockburger test, the court fashioned myriad "tests" which could lead to contrary results.[160] Moreover, the court did not feel constrained by any one test or by any of its own case precedents.[161] As the court stated in United States v. McClary:

> [O]ur previous rulings do not require a holding of multiplicity. Generally speaking, in determining multiplicity we have used the Manual test which provides that the offenses are separate if each offense requires proof of an element not required to prove the other. In some instances, that principle has been rejected because it was believed it use would

violate the cardinal principle of law that a person may not be twice punished for the same crime.[162]

In effect, the court had assumed the role of final arbiter in the double jeopardy arena of cumulative punishment.

The court reviewed multiplicity issues with a single standard in mind, a standard expressed in sententious maxim: "As it is true that a rose by any other name would smell as sweet, so it is equally true that a man may be punished only once for the same offense regardless how that offense is labeled."[163] Thus, when the President promulgated the 1969 Manual, he included in paragraph 76 a caveat warning against the court's possible selection of one of its own unique tests.[164]

By citing paragraph 76a(8) in support of its contention that the President had tacitly authorized the Court of Military Appeals to promulgate alternate tests, the court was in reality dealing in self-fulfilling

prophecy. In order to confirm the power it had usurped, the court did no more that exploit the President's recognition of the court's disregard for the test prescribed by the 1951 Manual. The court tacitly corrected its disingenuous reliance on paragraph 76a(8) in United States v. Smith; there, the court first applied a correct interpretation of the Blockburger test but then declared, "United States v. Baker, supra, did not content itself with the Blockburger rule."[165]

Since the court's decisions in Baker and Smith, the court has not entertained challenges to its rules of multiplicity for sentencing. Rather, the focus of challenge has shifted to the court's rules of multiplicity for findings.

B. Multiplicity for Purposes of Findings.

Where multiplicity issues for findings and sentence in federal practice are not independent questions,[166] the Court of Military Appeals has deemed these issues

separate in military practice. Thus, offenses may be separate for purposes of findings but multiplicious for sentencing. In Baker, the court correctly identified the issue as one of constitutional magnitude; the court, however, defined the double jeopardy interest not as a matter of legislative intent but as one of due process notions of lesser included offenses.[167]

Once separate specifications are identified as arising from the same criminal transaction, the test, as stated in Baker, focuses on two questions: first, whether one of the specifications is lesser included of the other as a matter of law; second, whether the allegations of fact set forth in one specification are "fairly embraced" in the factual allegations of the other and established by evidence introduced at trial.[168] Stated otherwise, offenses are multiplicious for findings if the allegations of fact set forth in one of the specifications would require an instruction for findings on the other, lesser included offense as a matter of due process.

Insofar as this test required dismissal of offenses which were lesser included as a matter of law, the rule did not differ from the Supreme Court's decision in Ball or, for that matter, the court's earlier decision in United States v. Drexler.[169] To the extent that the test required dismissal of findings simply because pleadings were inartfully drafted, the test is inane. Even in the absence of legislative intent concerns, the test constitutes little more than a notion that an accused should escape prosecution and punishment for an offense simply because the allegations contained in the specifications or the evidence introduced at trial establish some latent, or even patent, relationship between the specifications. When legislative intent is considered, the test is indefensible because it rejects legislative intent as the sole measure of authorized punishment. The court's defense of this rule has been equally inane and indefensible.

In United States v. Doss, the court declared that "some confusion existed in [its] precedents" on the subject of multiplicity for findings and concluded that

"some further comment emphasizing Baker [might] be appropriate."[170] The court explained:

> [I]n upholding the state-court conviction in [Missouri v. Hunter] the Supreme Court did not purport to limit the power of Congress or the President to prescribe different, more lenient procedures for trial by court martial. In Baker, we made clear that in fact this has occurred.[171]

The court then explained: "Presumably, in prescribing these rules the President took into account those consideration to which Justice Marshall called attention in his dissent in Missouri v. Hunter."[172]

The problem with the court's presumption is self-apparent: Missouri v. Hunter was decided in 1983, some thirty years after paragraph 26b was first promulgated. In effect, the court attributed to President Harry S. Truman concerns that Justice Douglas did not articulate until 1958.[173] Moreover, the court cited but failed to attribute any significance to the fact that both the 1951

Manual and the 1969 Manual specifically authorized multiple convictions for the same offense-even if those offenses were "the same offense" as a matter of law.[174]

The court has from time to time paid lip service to legislative intent.[175] Recently, the court seemed to announce a new basis for its multiplicity rulings. In United States v. Hickson, the court analyzed the mulitplicity issue on the basis of legislative intent characterized its decisions on multiplicity as follows: "In various cases we attempted to provide guidance as to factors which might held in ascertaining what maximum punishment had been intended when an accused was convicted of several offenses arising out of the same transaction."[176] Although the court analyzed the issue in terms of legislative intent, it failed or refused to apply the test mandated by the Supreme Court; further, it failed or refused to acknowledge the presumption of legislative intent established by the Supreme Court in United States v. Albernaz.[177]

The lack of merit in the Hickson rationale is evidenced by a subsequent decision issued by the court. In United States v. Jones, the court lapsed again into a contention that the multiplicity rules it has devised are based on constitutional law and on the Manual for Courts-Martial.[178] In Jones, the court reversed a decisions by the Navy-Marine Court of Military Review that held that the President had superseded the court's decision in Baker by prescribing a return to the Blockburger test in the new Manual for Courts-Martial promulgated in 1984.[179] They gave the matter short shrift:

> The initial assertion of the court below is based on a profound misunderstanding of the legal basis of this Court's decision in United States v. Baker, supra. Its unsoundness is further exacerbated by an unsupportable reading of the cited rules in the new Manual for Courts-Martial. Finally, the intermediate court's simplistic embrace of the "Blockburger" rule ignores significant problems concerning its propriety as the sole test for determining double-jeopardy claims, particularly in the context of a jurisdiction's law defining a lesser included offense.[180]

The foregoing line of cases illustrates that, while the early court misunderstood the Blockburger rule and resorted to alternate tests out of necessity, the present court fully understands the Blockburger rule and willfully disregards it.

IV. CONCLUSION

Supreme Court precedents have fully explored and established the limits of the double jeopardy protection against multiple punishment for the same offense. There is but one limit, legislative intent.[181] The Supreme Court has also mandated the rules of construction to be utilized when legislative intent with respect to the imposition of cumulative punishments is not otherwise manifest. The United States Court of Military Appeals has determined that it will not be bound by these decisions. Thus, one might petition the Supreme Court assigning as error the following question: CAN THE COURT OF MILITARY APPEALS REFUSE TO FOLLOW A PRECEDENT OF THIS COURT?

The Court of Military Appeals has from time to time relied on various provisions of the several Manuals for Courts-Martial for its errant adventure into the realm of the proper apportionment of punishment. Out of fairness to the court, the Manual's statement of the Blockburger test is more than a little ambiguous. The Manual has invariably phrased the test as "offenses are separate if each offense requires proof of an element not required to prove the other."[182] Such a definition violates a cardinal rule of definition by defining the term "offense" using the word "offense." The word "offense" is susceptible of several meanings. The term could be construed to refer to the offense defined by Congress in the Uniform Code of Military Justice, the factual allegations charged in the specification, or accused's misconduct as established by the evidence introduced at trial. Thus, the Manual's circular use of the term is ambiguous.

More important, however, the test prescribed by the various Manuals has been fatally flawed in two other

respect. The Manual does not state the test as a rule of statutory construction. Rather, the "test" is stated as a dispositive rule of law. In this sense, the statement of the test contained in the 1951 Manual fails to make legislative intent the measure of permissible punishment. In effect, the test provided by the Manual does not serve to assist the courts in determining the punishment authorized by Congress; rather, the test itself defines the measure of permissible punishment. Additionally, the various Manuals have incorrectly mandated application of the Blockburger test in all situations. As stated above, the Blockburger test was designed only for application when there was an issue whether Congress intended multiple punishment under two separate statutory provisions.[183]

In fairness to the Court of Military Appeals, the problems with military mulitplicity practice rest as much with the Manual as with the court. But this fact does not justify the court's wholesale disregard for constitutional law. The constitutional infirmities in the multiplicity practice fashioned by the court would

not dissipate if the Manual prescribed the very rules the court employs. Further, practical concerns such as judicial economy, certainty, and stare decisis weigh heavily in favor of modifying military practice to mirror federal practice.

[1] Whalen v. United States, 445 U.S. 684, 699-705 (1980)(Rehnqust, J., dissenting).

[2] United States v. Zupancic, 18 M.J. 387, 392 (C.M.A. 1984)(Cook, J., concurring in part, dissenting in part)(a "minefield"); United States v. Baker, 14 M.J. at 372 (Cook, J., dissenting)(a "mess").

[3] United States v. Doss, 15 M.J. 409, 410 (C.M.A. 1983).

[4] United States v. Hickson, 22 M.J. 387, 392 (C.M.A. 1984) (Cox, J., concurring in the result).

[5] The United States Air Force Court of Military Review have derided the military multiplicity rules. In United States v. Barnard, Judge James described military multiplicity practice as a "[descent] into that inner circle of the Inferno where the damned endlessly degate multiplicity for sentencing." United States v. Barnard, 32 M.J. 530, 537 (A.F.C.M.R. 1990). In United States v. Meace, Judge Mitchell described litigation on the issue as "prolix and futile," a "[constant] search for the perfect smoke, the savor of which can only be imagined and never experienced." United States v. Meace, 20 M.J. 972, 972-73 (A.F.C.M.R. 1985).

[6] 5 N.Y. State Bar Bull. 267 (1933), reprinted in Robert A. LeFlar, Appellate Judicial Opinions 140-141 (1974).

[7] See generally United States v. Baker, 14 M.J. 361, 364-70 (C.M.A. 1983). Compare United States v. Baker, 14 M.J. at 364-67 (multiplicity in charging), with United States v. Baker, 14 M.J. at 367-68 (multiplicity in findings), and United States v. Baker, 14 M.J. at 369-70 (mulitplicity in sentencing).

[8] Federal courts also use the word multiplicity in its generic sense. See, e.g., Hoffman-La Roche, Inc. v. Sperling, __ U.S. __, __, 110 S.Ct. 482, 487 (1989)("a multiplicity of duplicative suits"); H.J., Inc. v.
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Northwestern Bell Telephone Company, 492 U.S. 229, __, 109 S.Ct. 2893, 2895 (1989)("a multiplicity of [factual] predicates"); Owens v. Okure, 488 U.S. 235, 245 (1989)("a multiplicity of state intentional tort statutes of limitations"); Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 451 (1988)("a multiplicity of religious sects"); Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 497 (1983)("a multiplicity of conflicting results among the courts of the 50 states").

In its generic sense, the word means "the quality or state of being multiple, manifold, or various." Webster's Third New International Dictionary 1486 (15th ed. 1969).

9 Sanabria v. United States, 437 U.S. 54, 66 n.20 (1978) (citing Fed. R. Crim. P. 7(c)(1) and Advisory Committee's Notes on Fed. R. Crim. P. 7, 18 U.S.C. App., p. 1413 (1976 ed.)).

10 Although the federal courts do not refer to these rules with the term "multiplicity," this paper will make reference to the "federal rule of multiplicity for findings" and the "federal rule of multiplicity for sentencing."

11 "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

12 Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 962 (1982)(Powell, J., concurring in the judgment).

13 Cf. Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 673 (1980)(Rehnquist, J., concurring in the judgment: "This Court has also recognized that a hermetic sealing-off of the three branches of government from one another could easily frustrate the establishment of a National Government
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capable of execising the substantive powers granted to the various branches by the Constitution").

14 Field v. Clark, 143 U.S. 649, 692 (1892).

15 U.S. CONST. art. I, § 1.

16 Whalen v. United States, 445 U.S. at 689 (emphasis added). Accord Albernaz v. United States, 437 U.S. 333, 343 (1981); Sanabria v. United States, 437 U.S. at 69; Burton v. United States, 202 U.S. 344, 377-78 (1906); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

17 Sanabria v. United States, 437 U.S. at 69.

18 Garrett v. United States, 471 U.S. 773, 789 n.2 (1985). Accord Ball v. United States, 470 U.S. 856, 859 (1985) ("This Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case").

19 Brown v. Ohio, 432 U.S. 161, 165 (1977).

20 Whalen v. United States, 445 U.S. at 689.

21 Missouri v. Hunter, 459 U.S. 359, 365 (1983).

22 North Carolina v. Pearce, 395 U.S. 711 (1969). Accord Grady v. Corbin, __ U.S. __, 110 S.Ct. 2084 (1990); Ex parte Lange, 85 U.S. (19 Wall.) 163 (1874). Cf. Brown v. Ohio, 432 U.S. at 165 ("once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors may not attempt to secure that punishment in more than one trial" (emphasis added)).

23 Garrett v. United States, 471 U.S. at 793 (citing Missouri v. Hunter, 459 U.S. at 366, and Albernaz v. United States, 450 U.S. at 344). Accord Jones v. Thomas,
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491 U.S. 376, 109 S.Ct. 2522, 2525 (1989); Ohio v. Johnson, 467 U.S. 493, 499 (1984).

24 The Whalen Court acknowledged that the existence of constitutional limitations on the legislative power to create and define offenses, Whalen v. United States, 445 U.S. at 689 n.3, but none of these limitations is pertinent to multiplicity. Cf. Coker v. Georgia, 433 U.S. 584 (1977)(death penalty statute held unconstitutional under the Eighth and Fourteenth Amendments); Roe v. Wade, 410 U.S. 113 (1973)(criminal abortion statute held void as vague and overbroadly infringing on the Ninth and Fourteenth Amendments); Stanley v. Georgia, 394 U.S. 557 (1969)(criminal statute prohibiting possession of obscene matter held unconstitutional infringement on First Amendment right to receive information free from government intrusion); Loving v. Virginia, 388 U.S. 1 (1967)(criminal statute prohibiting interracial marriages held unconstitutional violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

25 Sanabria v. United States, 437 U.S. at 69. Some Federal courts have gone so far to say that the Double Jeopardy Clause "places no limits 'on the power of Congress to define the allowable unit of prosecution and punishment where all the charges are brought in one suit.'" United States v. Johnson, 909 F.2d 1517, 1518 (D.C. Cir. 1990)(quoting United States v. McDonald, 692 F.2d 376, 377 (5th Cir. 1982)).

26 Albrecht v. United States, 273 U.S. 1, 11 (1926). The Court added, "[this] general principle is well established." Id.

27 Albernaz v. United States, 450 U.S. at 344; see also Missouri v. Hunter, 459 U.S. at 368-69.

28 85 U.S. (18 Wall.) 163 (1873).

29 Id. at 168.

30 Id. at 170.

31 Id. at 173.

32 120 U.S. 274 (1887).

33 Id. at 277.

34 Id. at 283 (citing Crepps v. Durden, 2 Cowp. 640, 98 Eng. Rep. 1283 (K.B. 1777)). In Crepps, a baker who had conducted business on Sunday in violation of statute was convicted of four charges each alleging separate business transactions on the same Sunday.

35 Id. at 284 (emphasis added).

36 Id. at 286.

37 Ex parte Lange, 85 U.S. (18 Wall.) at 168.

38 Shifts in the Supreme Court's view of the Double Jeopardy Clause may explain this apparent inconsistency. As recently as 1963, the Court was adamant that "the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.'" Downum v. United States, 372 U.S. 734, 736 (1963)(quoting United States v. Ball, 163 U.S. 662, 669 (1896)). It seems the Court found the implicit constitutional prohibition against mutliple punishment in Lange, rejected it in Ball, and found it again in North Carolina v. Pearce. See note 16, infra.

39 As the Supreme Court observed with respect to federal narcotics laws:

> Of course the various enactments by Congress extending over nearly half a centure constitute a network of provisions, steadily tightened and enlarged, for grappling with a powerful, subtle and elusive enemy. If legislation reveals anything, it reveals the determination of Congress to turn the screw of the criminal

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machinery--detection, prosecution, and punishment--tighter and tighter.

Gore v. United States, 357 U.S. 386, 390 (1958).

40 For example, A may rob a bank simply by placing his hand in an empty coat pocket and threatening the teller. B, on the other hand, may actually carry an automatic weapon, disguise himself as a police officer to gain entry into the bank, and steal a car in which to make his getaway. The idea that a legislative scheme of criminal justice should expose A to the same maximum punishment as B--or expose B to a maximum punishment no greater than A's--offends common sense. B's conduct is clearly the more criminally culpable.

41 For example, A burglarizes business X, an appliance store, and steals a television. B burglarizes business Y, a pharmacy, and steals the entire stock of narcotics. Although both A and B have engaged in essentially the same criminal acts, B's offense results in the illicit possession of narcotics.

42 United States v. Woodward, 469 U.S. 105, 109 (1985).

43 Albernaz v. United States, 450 U.S. at 340; accord Missouri v. Hunter, 459 U.S. at 367.

44 Missouri v. Hunter, 459 U.S. at 368. Accord Garrett v. United States, 471 U.S. at 779 ("the Blockburger rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history").

45 Missouri v. Hunter, 459 U.S. at 368-69.

46 See United States v. Batchelder, 442 U.S. 118 (1979).

47 United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952)(citations omitted).

48 Cf. Sanabria v. United States, 437 U.S. at 70 n.24 ("Because only a single violation of a single statute is at issue here, we do not analyze this case under the so-called 'same evidence' test, which is frequently used to determine whether a single transaction may give rise to [separate punishments] . . . under separate statutes"); American Tobacco Co. v. United States, 328 U.S. 781, 788 (1946)("In contrast to the single conspiracy described in [Braverman v. United States, 317 U.S. 49 (1942),] separate counts, all charged under the general conspiracy statute, . . . , we have here separate statutory offenses").

49 Gore v. United States, 357 U.S. at 391.

50 Bell v. United States, 349 U.S. 81, 83 (1955).

51 For example, in United States v. Braverman, the Court held that the trial court erred in holding "that even though a single agreement is entered into, the conspirators are guilty of as many single offenses as the agreement has criminal objects." United States v. Braverman, 317 U.S. at 52. The Court ruled, "The gist of the crime of conspiracy as defined by statute is the agreement of confederation of the conspirators to commit one or more unlawful acts." Id. at 53 (emphasis added).

52 For example, the case of In re Snow, discussed, infra., notes 27 - 30, and accompanying text.

53 See, e.g., Prince v. United States, 352 U.S. 322, 328 (1957)(the offense of unlawfully entering a bank with the intent to commit robbery under 18 U.S.C. § 2113(a) held to merge with the completed robbery under 18 U.S.C. § 2113(a)).

54 Cf. Sanabria v. United States, 437 U.S. at 66 n.20 ("a single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged" (emphasis added)). For example, in United States v. Johnson, the accused was convicted of two specifications of desertion, each

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alleging a different intent for the same act. United States v. Johnson, 17 C.M.R. 297, 301 (C.M.A. 1954).

55 United States v. Universal C.I.T. Credit Corp., 344 U.S. at 224.

56 Ebeling v. Morgan, 237 U.S. 625, 627 (1915).

57 Id. at 627-28.

58 Id. at 629 (emphasis added).

59 Offenses are "separate statutory offenses" when they are set forth in separate sections of the United States Code. The Court has repeatedly declined to draw any inference of legislative intent from the fact that statutory offenses were created by the same legislative enactment. Compare Braverman v. United States, 317 U.S. at 50, 53 (seven counts of conspiracy charged under the general conspiracy statute, 18 U.S.C. § 88 (1940), held a single offense where there was but one conspiracy to commit seven crimes), with Albernaz v. United States, 450 U.S. at 334, 335, and American Tobacco Co. v. United States, 328 U.S. at 787-88. See also Albrecht v. United States, 273 U.S. at 11.

In Albernaz, the Court held two conspiracy convictions separate for punishment, one a conspiracy to import marijuana under 21 U.S.C. § 963, the other conspiracy to distribute marijuana under 21 U.S.C. § 846; there was but one conspiracy and both statutes were enacted as part of the Drug Abuse Prevention and Control Act of 1970. In American Tobacco Co., the Court again held two conspiracy convictions separate, one conspiracy in restraint of trade under 15 U.S.C. § 1 and the other conpiracy to monopolize under 15 U.S.C. § 2; there was but one conspiracy and both statutes were enacted as part of the Sherman Anti-Trust Act. In Albrecht, the Court affirmed convictions for possessing and selling the same liquor even though both counts were charged under statutes enacted as part of the National Prohibition Act.

60 "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932).

61 Albernaz v. United States, 450 U.S. at 341, 342 (citations omitted). Significantly, three of the more liberal justices sitting on the Court, Justices Powell, Brennan, and Blackmun, joined in this majority opinion authored by Justice Rehnquist.

62 As indicated above, the Blockburger test is not a "conclusive determinant." Garrett v. United States, 471 U.S. at 779. "Insofar as the question is one of legislative intent, the Blockburger presumption must of course yield to a plainly expressed contrary view on the part of Congress." Id.

63 Grady v. Corbin, 110 S.Ct. at 2097 ("This test focuses on the statutory elements of the two crimes . . ., not on the proof that is offered or relied upon to secure a conviction"); Illinois v. Vitale, 447 U.S. 410, 416 (1980)(In Brown v. Ohio, . . . [w]e recognized the Blockburger test focuses on the proof necessary to prove the statutory elements of each offense rather than on the actual evidence to be presented at trial"); Brown v. Ohio, 432 U.S. at 166 ("This test emphasizes the elements of the two crimes"). See also Blockburger v. United States, 284 U.S. at 304 ("the test . . . is whether each provision requires proof of a fact which the other does not" (emphasis added)).

64 Burton v. United States, 202 U.S. at 380. Accord Gavieres v. United States, 220 U.S. at 343. See also Martin v. Taylor, 857 F.2d 958, 962 (4th Cir. 1989)(the Blockburger test is one of "narrow focus on the technical elements of the offenses charged").

65 United States v. Chrane, 529 F.2d 1236, 1238 (5th Cir. 1976).

66 Ashe v. Swenson, 397 U.S. 436, 450-51 (1970)(Brennan, J., concurring).

67 Id. at 451 (Brennan, J., concurring).

68 Gavieres v. United States, 220 U.S. 338 (1911). Before the Court's decision in Gavieres, the Court had merely observed that "there have been nice questions in the application of the [elements] rule to cases in which the act charged was such as to come within the definition of more than one statutory offence." Ex parte Lange, 85 U.S. (18 Wall.) at 168.

69 Gore v. United States, 357 U.S. 386 (1958).

70 See, e.g., Whalen v. United States, 445 U.S. at 705; United States v. Jeffers, 432 U.S. 137, 147 (1977).

71 See, e.g., Brown v. Ohio, 432 U.S. at 166.

72 See, e.g., Blockburger v. United States, 284 U.S. at 304.

73 Corbin v. Grady, 110 S.Ct. at 2093 n.12. The Court frequently refers to the Blockburger test as the "so-called" same evidence test. See, e.g., Sanabria v. United States, 437 U.S. at 70 n.24.

74 Cf. Brown v. Ohio, 432 U.S. at 167, 168 (proof of one statutory offense would "necessarily" and "invariably" prove the other statutory offense). In Brown, the Court found dispositive the fact that "the prosecutor who has established joyriding need only prove the requisite intent in order to establish auto theft [as well]." Brown v. Ohio, 432 U.S. at 167.

75 See Grady v. Corbin, 110 S.Ct. at 2090.

76 Blockburger v. United States, 284 U.S. at 304 (emphasis added). Accord Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975)("[T]he Court's application of the test focuses on the statutory elements of the

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offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes").

77 Harris v. United States, 359 U.S. 19 (1959).

78 See Keeble v. United States, 412 U.S. 205, 208 (1973).

79 Id.

80 Id.

81 Hopper v. Evans, 456 U.S. 605 (1982). Otherwise, a jury has but two choices, convict the defendant of the principle offense charged or acquit him. The Court has held that such a Hobson's choice injects "a level of uncertainty and unreliability" into criminal proceedings. See Baldwin v. Alabama, 472 U.S. 372, 386 (1985).

In the absence of a due process entitlement to conviction on closely related, lesser included offenses, a jury would be faced with but two options, conviction or acquittal of the more serious offense, when it is convinced that the defendant has committed some crime which merits punishment but is not convinced that he has committed the offense charged. Id. Because of the unavailability of a lesser included offense, such a choice could lead a jury "erroneously to convict a defendant." Id. A lesser included offense instruction channels the jury's discretion "so that it may convict a defendant of any crime fairly supported by the evidence." Hopper v. Evans, 456 U.S. at 611. In this respect, the jury's role is more than merely determining whether the defendant committed the acts alleged in an indictment; the jury is also tasked with determining level of the defendant's culpability and the "extent to which he is morally blameworthy." Lockhart v. McCree, 476 U.S. 162, 200 (1986).

82 Albrecht v. United States, 273 U.S. at 11.

[83] United States v. Woodward, 469 U.S. at 106-108.

[84] Id. at 109 (citing Albernaz v. United States, 450 U.S. at 341-42).

[85] Ladner v. United States, 358 U.S. 169, 178 (1958).

[86] Prince v. United States, 352 U.S. 322, 329 (1957).

[87] Callanan v. United States, 364 U.S. 587, 596 (1961).

[88] See generally Ball v. United States, 470 U.S. at 858 n.5.

[89] See, e.g., United States v. Chrane, 529 F.2d at 1238.

[90] See generally Benton v. Maryland, 395 U.S. 784, 786-791 (1969).

[91] See Ball v. United States, 470 U.S. at 864-65 ("potential adverse collateral consequences" and "societal stigma"). Here again, the Court could have disposed of the case on the basis of the separation of powers. If, as the Court stated, Congress did not intend a separate conviction, Ball, 470 U.S. at 865, then the Court had no power to adjudge the conviction. Cf. Whalen v. United States, 445 U.S. at 689 (the power to define criminal offenses resides wholly with the Congress); Sanabria v. United States, 437 U.S. at 69 ("it is the Congress, and not the prosecution, which establishes and defines offense").

[92] Sanabria v. United States, 437 U.S. at 65 n.19. Accord United States v. Moody, 1991 WL 5751 (5th Cir. 1991); United States v. Briscoe, 896 F.2d 1476, 1522 (7th Cir. 1990); United States v. Eaves, 877 F.2d 843, 847 (11th Cir. 1989); United States v. Rodriguez, 858 F.2d 809, 810 n.2 (1st Cir. 1989); United States v. Duncan, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988); United States v. Fiore, 821 F.2d 127, 130 (2d Cir. 1987); United States v. Stanfa, 685 F.2d 85, 86 (3d Cir. 1982).

93 United States v. Briscoe, 856 F.2d at 1522. Accord United States v. Maldonado-Rivera, 1990 WL 200698 (2d Cir. 1990); United States v. Fiore, 821 F.2d at 130; United States v. Stanfa, 685 F.2d at 87.

94 United States v. Batchelder, 442 U.S at 123-24 (emphasis added).

95 See Ball v. United States, 470 U.S. at 860 n.7.

96 Id.

97 Id. (quoting Ohio v. Johnson, 467 U.S. at 500).

98 Hopper v. Evans, 456 U.S. at 611; see Beck v. Alabama, 447 U.S. 625 (1980). Of course, due process and the double jeopardy protection would also require an instruction that the jury could convict the defendant of only one, but not both, of the offenses. See Ball v. United States, 470 U.S. at 868 n. (Stevens, J., concurring in the judgment).

99 See, e.g., In re Snow, 120 U.S. 274 (1887).

100 United States v. Woodward, 469 U.S. at 109.

101 357 U.S. 386 (1958).

102 Id. at 395 (Douglas, J., dissenting).

103 284 U.S. 299 (1932).

104 United States v. Gore, 357 U.S. at 395 (Douglas, J., dissenting).

105 In Ohio v. Johnson, a defendant indicted in four counts for murder, involuntary manslaughter, aggravated robbery and grand larceny, all arising out of a single transaction, made a similar claim. Ohio v. Johnson, 467 U.S. 493 (1984). He entered pleas of guilty to involuntary manslaughter and grand larceny and pleas of not guilty to murder and aggravated robbery. The trial

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court accepted Johnson's pleas of guilty over the State's objection. Johnson then moved to dismiss the murder and aggravated robbery counts "on the ground that because of his guilty pleas, further prosecution on the more serious offenses was barred by the double jeopardy prohibitions." Id. at 494. The Court's response was brief:

> The grand jury returned a single indictment, and all four charges were embraced within a single prosecution. Respondent's argument is apparently based on the assumption that trial proceedings, like amoebae, are capable of being infinitely subdivided . . . We have never held that, and decline to hold it now.

Id. at 501. The Court concluded that acceptance of Johnson's pleas "has none of the implications of an 'implied acquittal'" and that an opposite rule would "deny the State its right to one full and fair opportunity to convict those who have violated its laws." Id. at 502.

106 United States v. Gore, 357 U.S. at 396 (quoting "Bishop, 1 Criminal Law (9th ed. 1923) § 1060").

107 Id. at 392. The Supreme Court first adopted the so-called Blockburger test in 1911. United States v. Gavieres, 220 U.S. 338 (1911). The rule was first articulated in Morey v. Commonwealth, 100 Mass. 433 (1871). See generally Grady v. Corbin, 110 S.Ct. at 1086 (citing Morey v. Commonwealth, 100 Mass. 433 (1871)). See also Whalen v. United States, 445 U.S. at 705 n.1 (same).

108 Gore v. United States, 357 U.S. at 392-93.

109 Id. at 393.

110 Missouri v. Hunter, 459 U.S. at 372 (Marshall, J., dissenting).

111 Id. at 372, 373 (Marshall, J., dissenting).

[112] Id. at 373 (Marshall, J., dissenting).

[113] Missouri v. Hunter, 459 U.S. at 368. One should also note that Justice Marshall's argument that the "creation of multiple crimes serves only to strengthen the prosecution's hand" is not a double jeopardy contention, but a due process, fundamentally-fair-trial argument.

[114] Cf. United States v. Holliman, 16 M.J. 164, 167 (C.M.A. 1983)("What public policy is offended by requiring such a criminal to bear the stigma of his misconduct I cannot imagine! How justice and society are served by masking such deed I am at a loss to explain!" (Cook, J., concurring in part, dissenting in part)).

[115] North Carolina v. Pearce, 395 U.S. 711 (1969). Accord Grady v. Corbin, 110 S.Ct. at 2090.

[116] See generally Whalen v. United States, 445 U.S. at 699-705 (Rehnquist, J., dissenting). Justice Rehnquist observed:

> [T]his guarantee seems both one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights . . . . This Court has done little to alleviate the confusion, and our opinions, including the ones authored by me are replete with mea culpa's occasioned by shifts in assumptions and emphasis.

Id. See also Whalen v. United States, 445 U.S. at 697-98 (concurring in the judgment, Justice Blackmun said, "Dicta in recent opinions of this Court at least have suggested, and I now think wrongly, that the Double Jeopardy Clause may prevent the imposition of cumulative punishments . . . [and] have caused confusion among state courts that have attempted to decipher our pronouncements concerning the Double Jeopardy Clause's role in the area of multiple punishment"); Burks v. United States, 437 U.S. 1, 9 (1978)(the decisions on

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this issue "can hardly be characterized as models of consistency and clarity"); Sanabria v. United States, 437 U.S. at 80 (dissenting, Justice Blackmun said, "This case will afford little guidance as precedent in the Court's continuing struggle to create order and understanding out of the confusion of the lengthening list of its decisions on the Double Jeopardy Clause").

117 Green v. United States, 355 U.S. 184, 187 (1957)(quoted with approval in Grady v. Corbin, 110 S.Ct. at 2091).

118 United States v. Brooklier, 637 F.2d 620, 622 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981).

119 Grady v. Corbin, 110 S.Ct. at 2091-92.

120 Brown v. Ohio, 432 U.S. at 165.

121 See Grady v. Corbin, 110 S.Ct. at 2093 ("a technical comparison of the elements of the two offenses . . . does not protect defendants sufficiently from the burdens of multiple trials").

122 Burton v. United States, 202 U.S. at 380. Accord Gavieres v. United States, 220 U.S. at 343.

123 See generally In re Nielsen, 131 U.S. 176, 189-90 (1889).

124 Id. at 190.

125 Id.

126 Ashe v. Swenson, 397 U.S. at 452 (Brennan, J., concurring).

127 "We defined collateral estoppel as providing that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future
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lawsuit.'" Dowling v. United States, ___ U.S. ___, ___, 110 S.Ct. 668, 672 (1990)(quoting Ashe v. Swenson, 397 U.S. at 443).

128 Cf. Sealfon v. United States, 332 U.S. 575 (1948)(res judicata may bar successive prosecutions even where the offenses are separate and distinct).

129 See Ashe v. Swenson, 397 U.S. at 457 (Brennan, J., concurring, declared that this "anomaly" was "intolerable"). Ironically, the elements test now referred to as the Blockburger test was adopted in a case involving successive prosecutions. See Gavieres v. United States, 220 U.S. at 343.

130 The test was proposed both in the Model Penal Code proposed and by the American Law Institute and the Standards for Criminal Justice articulated by the American Bar Association. ALI, Model Penal Code § 1.08(2)(Tent. Draft No. 5, 1956); ABA Standards for Criminal Justice, Standard 13-2.3(c)(2d ed. 1980 & Supp 1986).

131 Fed. R. Crim. P. 8(a) provides in pertinent part: "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged . . . are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

132 ABA Standards for Criminal Justice Standard 13-2.3(c) (2d ed. 1980 & Supp. 1986). See ALI Model Penal Code, § 1.10 (Tent. Draft No. 5, 1956).

133 United States v. Brooklier, 637 F.2d at 622 (citing J. Sigler, DOUBLE JEOPARDY 222-28 (1969): Note, The Double Jeopardy Clause as a Bar to Reintroducing Evidence, 89 YALE L.J. 962, 867-969, 976-81 (1980); "The Supreme Court, 1976 Term," 91 HARV.L.REV. 70, 106-114 (1970)).

[134] Ashe v. Swenson, 397 U.S. at 453 (Brennan, J., with whom Marshall and Douglas, JJ., joined, concurring: "In my view, the Double Jeopardy Clause requires the prosecution . . . to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction").

[135] Grady v. Corbin, 110 S.Ct. at 2093 n.12, 2094 n.15.

[136] See Dowling v. United States, __ U.S. __, 110 S.Ct. 668, 671 (1990)("In Ashe v. Swenson, we recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel"). The Court had earlier questioned the existence of a relationship between the constitutional protection and the judicial doctrine. Hoag v. New Jersey, 356 U.S. 464, 471 (1958).

[137] Brown v. Ohio, 432 U.S. at 166 n.6 (citing Ashe v. Swenson, 397 U.S. 436 (1970)). Athough the dicta in Brown signalled that the Court was preparing to broaden the double jeopardy safeguard against successive trials, the Court nevertheless resolved the case using a pure Blockburger analysis. Brown v. Ohio, 432 U.S. at 167-168, 167 n.6.

[138] Grady v. Corbin, ___ U.S. ___, 110 S.Ct. 2084 (1990).

[139] Grady v. Corbin, 110 S.Ct. at 2090-91.

[140] Id.

[141] Id. at 2093.

[142] Id. at 2093 (citations omitted).

[143] Cf. Missouri v. Hunter, 459 U.S. at 374 (Marshall, J., dissenting: "the Double Jeopardy Clause cannot be reasonably interpreted to leave legislatures completely free to subject a defendant to the risk of multiple punishment on the basis of a single criminal transaction . . . [i]n the context of multiple prosecutions, it is

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well established that the phrase 'the same offense' has [meaning independent of statutory law] . . . [o]therwise, multiple prosecutions would be permissible whenever authorized by the legislature").

144 Cases frequently present both interests protected by the Double Jeopardy Clause. See, e.g., Garrett v. United States, 471 U.S. at 777.

145 See,. e.g., Brown v. Ohio, 432 U.S. at 166-167 n.6 (citing Ashe v. Swenson, 397 U.S. 436 (1970)).

146 Cf. Grady v. Corbin, 110 S.Ct. at 2091 n.8 ("Justice SCALIA's dissent contends that Blockburger is not just a guide to legislative intent, but rather an exclusive definition of the term "same offence" in the Double Jeopardy Clause"). See Grady v. Corbin, 110 S.Ct. at 2097-98 (Scalia, J., dissenting, with whom Rehnquist and Kennedy, JJ., join, dissenting). See also Grady v. Corbin, 110 S.Ct. at 2095 (O'Connor, J., dissenting: "I agree with much of what Justice SCALIA says in his dissenting opinion"); Garrett v. United States, 471 U.S. at 796 (O'Connor, J., concurring: "The [double jeopardy] concerns for finality . . . are no more absolute than those involved in other contexts").

147 See, e.g., Whalen v. United States,. 445 U.S. at 705 (Rehnquist, J., dissenting: "I believe that the Double Jeopardy Clause should play no role whatsoever in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding").

148 See, e.g., Missouri v. Hunter, 459 U.S. at 372 (Marshall, J., dissenting).

149 See Whalen v. United States, 445 U.S. at 697 (Blackmun, J., dissenting: "Dicta in recent opinions of this Court at least have suggested, and I now think wrongly, that the Double Jeopardy Clause may prevent the imposition of cumulative punishments in situations in
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which the Legislative Branch clearly intended that multiple penalties be imposed for a single criminal transaction" (citing Simpson v. United States, 435 U.S. 6, 11-13, (1978), and Jeffers v. United States, 432 U.S. at 155.

150 United States v. Baker, 14 M.J. at 369, 370.

151 Id. at 369-70 (quoting Manual for Courts-Martial, United States, 1969 (rev.), paragraph 76a(5).

152 Manual for Courts-Martial, United States, 1951 [hereinafter MCM, 1951], paragraph 74b(4).

153 Hodson, "Status and Duties of the Law Officer, Findings and Sentence; Revisions; Rehearing," Legal & Legislative Basis: Manual for Courts-Martial, United States, 1951, 77-78 (emphasis added). The Preface of Legal & Legislative Basis states:

> This pamphlet contains a short history of the preparation of the Manual for Courts-Martial, United States, 1951, together with brief discussions of the legal and legislative considerations involved in the drafting of the book. With minor exceptions, the discussions of the various subjects were written by the officers who prepared the initial drafts of the comparable portions of the manual.

154 See, e.g., United States v. Beene, 15 C.M.R. 177, 180 (C.M.A. 1954)("Blockburger indicates that each count of an indictment must require proof of a distinct and additional fact in order that it may constitute a basis for separate punishment"); United States v. McVey, 15 C.M.R. 167, 173 (C.M.A. 1954)("Regardless of the form of the rule, only the facts necessary and to allege and prove the elements of the offense are involved" (emphasis added)).
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The case United States v. Redenius, 15 C.M.R. 161 (C.M.A. 1954), illustrates the tortured approach adopted by the court. In Redenius, the accused was convicted and sentenced for two specifications of desertion under Article 85 of the Uniform Code of Military Justice. Section 885 of Title 10 provided in pertinent part:

> (a) Any member of the armed forces of the United States who--
>
> (1) without proper authority goes or remains absent from his place . . . of duty with intent to remain away therefrom permanently; or
>
> (2) quits his . . . place of duty with intent to avoid hazardous duty or to shirk important service; or
>
> . . . .
>
> is guilty of desertion.

One specification charged desertion "with intent to remain a permanently"; another charged desertion "with intent to shirk important service." The court concluded that "[s]ince a different intent is set out in each of the specifications, and present intent may be regarded as a fact, superficial application of the Blockburger test makes it appear that two offenses are described." Id. at 166 (emphasis added).

The court ignored the plain statement of the rule in Blockburger and in Gavieres. Instead, the court mistakenly lifted the language of the Blockburger test out of context and fashioned an entirely new test.

Although many decisions by the Supreme Court reiterated the test, the Court of Military Appeals was stubborn in its misinterpretation of the test. See

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United States v. Gibson, 11 M.J. 435, 437 (C.M.A. 1981)("under principles enunciated by the Supreme Court, offenses should be treated as the same when in light of the allegations, the proof of one necessarily requires proof of the other" (emphasis added)(citing, "cf.", Illinois v. Vitale, 447 U.S. 410 (1980), Harris v. Oklahoma, 433 U.S. 682 (1977), and Brown v. Ohio, 432 U.S. 161 (1977))).

155 Grady v. Corbin, 110 S.Ct. at 2093 n.12.

156 United States v. Soukup, 7 C.M.R. 17, 21 (C.M.A. 1951) ("this standard [the Blockburger test] may not serve accurately and safely in all situations").

157 United States v. Brown, 23 C.M.R. 242, 243 (C.M.A. 1957).

158 United States v. Redenius, 15 M.J. at 165, 166.

159 United States v. Johnson, 17 C.M.R. 297, 299 (C.M.A. 1954).

160 The tests fashioned by the court included a literal, same evidence test, see, e.g., United States v. Redenius, 15 C.M.R. at 166-67; a "societal norms" test, see, e.g., United States v. Beene, 15 C.M.R. at 180; a test that reflected due process notions of lesser included offenses; see, e.g., United States v. McVey, 15 C.M.R. 167, 174 (C.M.A. 1954); an analysis for legislative intent, see, e.g., United States v. Bridges, 25 C.M.R. 383, 385 (C.M.A. 1958); an integrated transaction test, see, e.g., United States v. Murphy, 40 C.M.R. 283 (1969); and a single impulse test, see, e.g., United States v. Pearson, 41 C.M.R. 379 (1970).

161 United States v. Burney, 44 C.M.R. 125, 128 (C.M.A. 1971)("No one test is safe and accurate in all circumstances . . . [i]f the tests appear to produce a conflict, we should reconsider whether one of the
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conflicting tests appropriately applies to the immediate factual situation"). See United States v. Pearson, 41 C.M.R. 379, 380-81 ("the 'separate facts' test does indeed have utility here . . . [s]ummaries of other tests that have been applied in the past to determine multiplicity need not be discussed").

162 United States v. McClary, 27 C.M.R. 221, 225 (C.M.A. 1959)(emphasis added). In 1960, the court seemed to retreat from this position saying only that it had "announced variations of this [the 1951 Manual] rule." United States v. Hardy, 29 C.M.R. 303, 308 (C.M.A. 1960).

163 United States v. Posnick, 24 C.M.R. at 13. Accord United States v. Smith, 37 C.M.R. 319, 325 (C.M.A. 1967)("At the heart of the issue is the principle that an accused shall 'not be twice punished for the same offense'"); United States v. Blair, 27 C.M.R. 235, 238 (C.M.A. 1959)("A fundamental rule followed by this Court is that a person shall not be punished twice for the same offense"); United States v. Modesett, 25 C.M.R. at 415 ("In the field of punishment, the fundamental principle is that a person shall not be twice punished for the same offense" (citing United States v. Braverman, 317 U.S. 49 (1942))). See also United States v. Burney, 44 C.M.R. 125, 127 (C.M.A. 1971)("That a person not be punished twice for the same offense is a fundamental principle"); United States v. Mirault, 40 C.M.R. 33, 35 (C.M.A. 1969) ("Bearing in mind the primary concern that punishing an accused twice for what is essentially one offense must be avoided, we must [determine whether offenses are multiplicious]").

164 Accord United States v. Baker, 14 M.J. at 372 (Cook, J., dissenting).

165 United States v. Smith, 14 M.J. 430, 432 (C.M.A. 1983) (per curiam).

166 See infra note 91 and accompanying text.

167 See Baker, 14 M.J. at 367-68 (citing United States
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v. Duggan, 15 C.M.R. 396, 399-400 (C.M.A. 1954)). Actually, the due process, lesser included offense analysis was first articulated by Judge Latimer and applied to issues of multiplicity for sentencing.

In United States v. McVey, 15 C.M.R. 167 (C.M.A. 1954), Judge Latimer analyzed the question whether the offenses of robbery under Article 122, UCMJ, 10 U.S.C. § 922 (1950), and assault with a deadly weapon under Article 128, UCMJ, 10 U.S.C. § 128 (1950), were "multiplicious." He concluded:

> While an allegation of an aggravating factor may be surplusage to a principal offense, it may satisfy an element of the lesser . . . [t]herefore, we conclude that where, as here, the allegations of the specifications are broad enough to permit proof of the use of a deadly weapon, and its use constituted the force and violence of the robbery charge, an aggravated assault is a lesser crime included within the latter.

United States v. McVey, 15 C.M.R. at 174. The due process basis of Latimer's approach is clearly evident in his analysis:

> Tested somewhat differently, if we assume that the Government had alleged the offense in the same language, but it had been unable to establish the larceny, would not the allegations and the proof support a finding of assault with a dangerous weapon? [Yes.] The general rule is that where the specification contains facts showing all the constituent elements of the minor offense, it sufficiently alleges that offense. In construing the specification some liberality of interpretation is permitted.

Id.

[168] United States v. Baker, 14 M.J. at 368. The full text of the Baker provides:

> Assuming both offenses arise out of the same transaction, one offense may be a lesser-included offense of another offense in two situations: First, where one offense contains only elements of, but not all the elements of the other offense; second, where one offense contains different elements as a matter of law from the other offense, but these different elements are fairly embraced in the factual allegations of the other offense and established by evidence introduced at trial.

Id. This test expressly repudiates the Blockburger test because it permits a finding that that two offenses are multiplicious for findings when those offenses are not lesser included as a matter of law.

[169] Compare United States v. Ball, 470 U.S. 856 (1985), with United States v. Drexler, 26 C.M.R. 185, 188 (C.M.A. 1958).

[170] United States v. Doss, 15 M.J. 409, 410 (C.M.A. 1983).

[171] Id. at 411 (citing Manual for Courts-Martial, United States, 1969 (rev.) [hereinafter MCM, 1969], paragraph 26b).

Paragraph 26b of the 1951 and the 1969 Manuals provided: "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person." MCM, 1969, paragraph 26b; MCM, 1951, paragraph 26b. This provision indeed focuses on the charges and the parameters of the criminal transaction rather than on the distinctive elements of the statutes violated in the course of that criminal transaction. From an historical perspective, the court's decisions construing this provision have made it something of an enigma. Footnote continued on next page.

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Initially, the court did not view the rule of pleading set forth in paragraph 26b as a rule of multiplicity. Cf. United States v. Yarborough, 5 C.M.R. 106, 115 (C.M.A. 1952)("The only prohibition against multiplicity contained in the Manual is that voiced in paragraph 76a(8) which states that the maximum sentence may be adjudged only for separate offenses"). In United States v. McCormick, the court refused even to consider the question whether an allegedly "unreasonable multiplication of charges" amounted to an issue of mulitplicity. United States v. McCormick, 12 C.M.R. 117, 119 (C.M.A. 1953).

In 1955, the court for the first time indicated its concern with the Manual provision authorizing multiple convictions for the same offense and suggested that paragraph 26b of the Manual might limit the authority to refer charges to court-martial. For the most part the court had dodged the issue of multiplicity in findings. See, e.g., United States v. Dardeneau, 18 C.M.R. 86 (1955). The court even dismissed a challenge to separate convictions premised on the preemption doctrine because "the court did not impose punishment for the two offenses." United States v. Strand, 20 C.M.R. 13, 23 (C.M.A. 1955). In United States v. Warren, however, the Judge Latimer writing for the majority stated:

> We have considerable difficulty in determining why the original pleader drew the specifications to make a single transaction the basis for three separate offenses. The evidence interpreted reasonably indicates a continuous course of sexual misbehavior from the meeting in the bar to the completed crime. The lewd and lascivious acts in the two separate specifications were no more than a prelude to, and in essence part of, the completed offense. Yet, what appears to have been one criminal transaction was partitioned into three separate stages and each stage

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alleged a separate offense.

United States v. Warren, 20 C.M.R. 135 (C.M.A. 1955). Relying on paragraph 26b and failing to find any exigencies of proof, Judge Latimer stated: "Unless we are presented with more valid reasons than we find in this case, we are not disposed to permit the Government to allege lesser included offenses or separate offenses which arise out of the same transaction." Id. at 139.

Both Chief Judge Quinn and Judge Brosman filed separate opinions in Warren and distanced themselves from Judge Latimer's opinion. Chief Judge Quinn maintained that accusers are "free to allege an offense in as many ways as they . . . deem advisable"; he also observed that the court had not "intervened" unless the pleadings have resulted in multiple punishments for the same offense. United States v. Warren, 20 C.M.R. 135, 146 (C.M.A. 1955)(Quinn, J., concurring in the result). Chief Judge Quinn indicated that, although Judge Latimer's proposal "conflicts with this Court's prior decisions," id. at 145-46, he was "not opposed to reviewing charges upon the basis of an abuse of discretion." Id. at 146. Judge Brosman simply states that he could not "unreservedly" agree with Judge Latimer. Id. at 146 (Brosman, J., concurring). Although Judge Latimer's opinion in Warren did not express a clear majority view, it was published as the "majority" opinion and the separate opinions of Chief Judge Quinn and Judge Brosman did not entirely repudiate that view. Id. at 146.

In United States v. Albrico, the court observed the friction between paragraph 74b(4) of the 1951 Manual which authorized multiple convictions for the same offense and paragraph 26b of the 1951 Manual which provided that one transaction "should not be made the basis for an unreasonable multiplication of charges." United States v. Albrico, 23 C.M.R. 221, 223 (C.M.A. 1957). In Albrico, the court held that the specific authorization of paragraph 74b(4) controlled: "Where the Manual, supra, specifically authorizes the bringing of
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multiple charges arising out of the same transaction regardless of separability, it is difficult to see how the bringing of two charges allegedly out of the same transaction can be an abuse of discretion." Id. at 223-24.

In the case United States v. Drexler, the court first established a standard of "reasonableness" for by paragraph 26b: "[W]hen it is manifest that one charge is identical to another, a motion to dismiss one or the other is proper." United States v. Drexler, 26 C.M.R. 185, 188 (C.M.A. 1958)(emphasis added). Accord United States v. Middleton, 30 C.M.R. 54, 58 (C.M.A. 1960)("on timely objection, it is appropriate to dismiss a charge which merely duplicates another"). The court maintained, however, that the error of multiplicity affected only the sentence. The court stated:

> After verdict, the form of the initial charges need not be corrected by dismissing a duplicative count. Particularly an appellate tribunal need not take such action. Consequenlty, the appellate courts ordinarily direct only a reconsideration of the sentence, in instances where the form of the charges affects the sentence imposed upon the accused.

Id.

172 Id. at 411 (citing Missouri v. Hunter, 459 U.S. at 681-82. See infra notes 110-112 and accompanying text.

173 See infra notes 101-105 and accompanying text.

174 MCM, 1969, paragraph 74b(4); MCM, 1951, paragraph 74b(4). See United States v. Albrico, 23 C.M.R. at 223-24.

175 See United States v. Smith, 37 C.M.R. at 325 ("Application of the rule [against multiple punishment for the same offense] depends whether Congress intended
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to make each step in a single transaction separately punishable"). In doing so, however, the court repudiated the rule of statutory construction established in Blockburger. Id. at 325 ("In the absence of clear-cut congressional intention, the courts have followed a 'policy of lenity'" (emphasis added)). Instead, the court seemed to view the matter as a judicial policy not unlike the "one transaction, one punishment" view espoused by other jurists. Id. at 325 ("Essentially, the same idea is expressed in the Manual's observation that "[o]ne transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person").

The court also paid lip service to the Supreme Court's decision in Blockburger and the test prescribed by the Manual for Courts-Martial. United States v. Weaver, 39 C.M.R. 173, 175 (C.M.A. 1969)("This rule [paragraph 76a(8) of the 1951 Manual] is based largely on the decision of the United States Supreme Court in [Blockburger]'). But the court declared unabashedly, "However, this Court has not always followed the guidance of the [1951 Manual] in this area. Instead, we have considered each case on its own facts and at different times have applied different tests to determine whether offenses were separate." Id.

[176] United States v. Hickson, 22 M.J. 146, 153 (C.M.A. 1986)(citing United States v. Beene, 15 C.M.R. 177 (C.M.A. 1954); United States v. Redenius, 15 C.M.R. 161 (C.M.A. 1954); and United States v. Soukup, 7 C.M.R. 17 (C.M.A. 1951)).

[177] Compare United States v. Hickson, 22 M.J. at 151-155, with Albernaz v. United States, 450 U.S. at 341, 342 ("if anything is to be assumed from the congressional silence on this point, it is that Congress [is] aware of the Blockburger rule and legislate[s] with it in mind. It is not a function of this Court to
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presume that 'Congress was unaware of what it accomplished . . . .'").

178 United States v. Jones, 23 M.J. 301, 302-303 (C.M.A. 1987)(citing Ball v. United States, 470 U.S. 856 (1985), Garrett v. United States, 471 U.S. 773 (1985), et al.).

179 Id. at 302-303.

180 Id. at 303 (citations and footnote omitted).

181 The Court of Military Appeals has incorrectly read Missouri v. Hunter as authorizing "jurisdictions"--and presumably, inferior federal courts--to establish their own law of lesser included offenses. The Court's decision in Hunter was, however, premised in the doctrine of sovereignty. Compare Missouri v. Hunter, 459 U.S. at 368 ("We are bound to accept the Missouri court's construction of that State's statutes" (citing O'Brien v. Skinner, 414 U.S. 524, 531 (1974)), with Whalen v. United States, 445 U.S. at 687 ("Acts of Congress . . . certainly come within this Court's Art. III jurisdiction . . . and we are not prevented from reviewing the decisions . .. interpreting those Acts").

182 The full text of the test articulated in Blockburger provides: "the test . . . is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. at 304 (emphasis added).

183 Regardless of the argumentative merits of the court's reliance on the various provisions Manual, the question remains whether the Congress intended in Articles 36 and 56 to grant the President authority to override the double jeopardy protection against multiple punishments for what the legislature intended to be the "same offense." See Article 36 UCMJ, 10 U.S.C. § 836 (authorizing the President to promulgate rules of procedure "which may not be contrary to or inconsistent with this chapter"; Article 56, UCMJ, 10 U.S.C. § 856
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(authorizing the President to prescribe maximum punishments). Conversely, there is also the question whether Congress intended to grant the President the power to obviate the legislatively created distinctions between statutory enactments. Given the court's manifest predilections on the issue of multiplicity, the court would surely answer the foregoing questions in the affirmative.